BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

STEPHEN M. BASKO
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-365
Case No. 77-4186

S.S.A. No.

REALTOR SIGN SERVICE
(Employer)

Employer Account No.

Office of Appeals No. SD-6266

The claimant appealed the decision of the administrative law judge denying his application to reopen his appeal previously dismissed by an administrative law judge.

STATEMENT OF FACTS

On January 18, 1977 the Department mailed an unfavorable determination and notice of overpayment to the claimant informing him of his disqualification for unemployment insurance benefits under sections 1257(a) and 1257(b) of the Unemployment Insurance Code and ineligibility under section 1253(c) of the code. In addition, he was held liable for an overpayment of $816.

The claimant filed a timely appeal to an administrative law judge. Thereafter, a hearing was scheduled for Monday, March 7, 1977, at 1 p.m. at a Department field office in San Diego. Proper notice of the hearing was given to the claimant, the employer, and the Department.

The Department attended the hearing, the employer did not. The claimant planned to attend the hearing; however, he did not do so because of the following situation. At noontime on the day of the hearing he was asked by his girl friend to transport her eight-year-old daughter to a local hospital for medical attention for the child's injured knee. The symptoms of the injury had not occurred until shortly before the claimant was summoned for help. The mother had no automobile herself. Because of his regard for both the mother and the child the claimant complied with the mother's request.

At approximately 12:40 p.m. the claimant telephoned the office where the hearing was to be held but was unable to talk to the administrative law judge. He did talk to the person who answered the telephone, explained his difficulty at the hospital, and was told that he would receive a written notice of what he should do to reopen his case. Although the hospital was 15 minutes away from the place of the hearing, the claimant did not attempt to attend the hearing because he was anxious about the child's condition and had the only car which could be used to transport the child home. The claimant did not appear at the hearing.

A decision dismissing the claimant's appeal for his nonappearance was issued on the following day, March 8, 1977. The claimant filed a timely written application to reopen his appeal based upon the above-described facts. On April 15, 1977, an administrative law judge heard testimony on the claimant's appeal, including the issue of whether he had shown good cause for his failure to attend the hearing on March 7, 1977. The administrative law judge found that the claimant had not shown good cause for his failure to appear and denied his application to reopen the appeal. On May 10, 1977 the claimant filed a timely appeal from the administrative law judge's decision to this Board.

REASONS FOR DECISION

The issue of "good cause" for an appellant's failure to appear at an administrative law judge hearing is governed by Board Rule 5045(c) and (d), (Title 22, California Administrative Code section 5045(c) and (d)):

"(c) If an appellant or petitioner fails to appear at a hearing, the administrative law judge may issue a decision dismissing the appeal or petition. A copy of the decision shall be mailed to each party together with a statement concerning the right to reopen the appeal as provided in subsection (d).

"(d) Any such dismissed appeal or petition shall be reopened by the administrative law judge if the appellant or petitioner makes application in writing within twenty (20) days after personal service or mailing of the dismissal decision and shows good cause for his failure to appear at the hearing. Lack of good cause will be presumed when a continuance of the hearing was not requested promptly upon discovery of the reasons for inability to appear at the hearing. However, the administrative law judge may reopen the appeal or petition at any time within one (1) year after the date of the scheduled hearing if the appellant or petitioner was prevented from attending the hearing because his work took him out of the United States, and if the appellant or petitioner makes application in writing within twenty (20) days after his return to the United States." (emphasis added)

Effective January 1, 1976 the legislature amended a number of sections of the Unemployment Insurance Code to define "good cause" for the late filing of various appeals as including, but not limited to, "mistake, inadvertence, surprise or excusable neglect" (Stats. 1975, C. 979; see code sections 1328, 1330, 1334, 1377, 2707.2, 2704.4, 2737, 3654.4, 3655, 3656, 4655, 4656).

In response to this legislative change the Appeals Board in May of 1976 and again on May 5, 1977 amended its rules to define "good cause" as including, but not limited to, "mistake, inadvertence, surprise or excusable neglect" (see Board Rules 5002(j), 5005, 22 Cal. Adm. Code 5002(j), 5005).

As amended, the Board's rules reflect the legislative as well as the judicial policy that civil controversies should be decided on their merits (see generally 5 Witkin's California Procedure (1971, 2d Edition), p. 3702; Motions for Relief From Default, section 126; 473 Code of Civil

procedure; Gibson v. California Unemployment Insurance Appeals Board (1973), 9 Cal. 3d 494, 499; 108 Cal. Rptr 1).

However, even before the recent amendments to its rules, the Board had recognized the desirability of having disputes under the Unemployment Insurance Code decided on their merits. Thus, in Benefit Decision No. 6037, the Board held that an employer, the appellant, had shown good cause for the failure to appear at a hearing where a continuance had been sought by telegram shortly before the hearing because an important witness could not be present. The order of the administrative law judge denying a reopening of the appeal was reversed and the employer-appellant was granted another hearing by the Board.

In the present case, the claimant made a reasonable effort to notify the administrative law judge of his involvement at the hospital as soon as the facts of his situation could be communicated. Having undertaken to help the mother and the injured child, the claimant's decision to remain with them at the hospital was excusable.

DECISION

The order of the administrative law judge denying the claimant's application to reopen his appeal is reversed. The matter is remanded to an administrative law judge for a further hearing, if necessary, and a decision on the merits. The transcript of the hearing held on April 15, 1977, and the exhibits received in evidence at that hearing, are to be considered part of the record in this matter for all purposes.

Sacramento, California, August 16, 1977.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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RICHARD H. MARRIOTT

CONCURRING and DISSENTING -
Written Opinion Attached

HARRY K. GRAFE

CONCURRING AND DISSENTING OPINION

I concur in the result reached by my colleagues in the case presently before us; however, for the reasons I set forth in my dissenting opinion in Appeals Board Decision No. P-B-348 (which I incorporate herein by reference), I believe the proper approach to an interpretation of the "good cause" provisions of Board Rules 5045 (c) and (d) (Title 22, California Administrative Code) is to test the factual matrix against the wealth of judicial case law which has interpreted §473 of the Code of Civil Procedure, as the exculpatory provisions of §473 are virtually identical to those which will afford "good cause" under Board Rules 5002 (j) and 5005.

Applying the judicial interpretations of the provisions of §473 to the instant case produces the same result, but has the more commendable feature of affording parties, administrative law judges, the Employment Development Department, and the Department of Benefit Payments with a readily available source of precedental authorities, obviating the more precarious route of speculating what the view of this Board may be and not knowing the answer until a Board decision is rendered after-the-fact. The latter approach, which has been chosen by the Board majority in P-B-348 and this new precedent decision leaves parties, administrative law judges, and the two Departments in the limbo of having to play an ongoing guessing game.

The California courts, in examining the "excusable neglect" provision of §473, have held that disability or accident meets that exculpatory test (see Buck v. Buck (1954), 126 Cal App 2d 137; Fink & Schindler Co. v. Gavros (1925), 72 Cal App 688). The illness or accident need not be that of the party. In Van Dyke v. MacMillan (1958), 162 Cal App 2d 594, a default was set aside where, on the date set for trial in Yuba City, the defendant's attorney was ill in Los Angeles, but had sent a telegram to the judge and mailed an affidavit for continuance, which took two days to reach the court and did not arrive until after the default order had been entered. Likewise, the default order was lifted in Stub v. Harrison (1939) 35 Cal App 2d 685, as the defaulting party had been at the hospital with his seriously injured son.

Consequently, there is persuasive authority under the "excusable neglect" clause of §473 to relieve a party of a default order under facts similar to those in the instant case. As "excusable neglect" in the Board Rules must be given the same meaning as is given said clause in §473, those judicial decisions are precedent for granting reopening in the present case.

HARRY K. GRAFE